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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE AVILA, Defendant and Appellant.	2d Crim. No. B212804 (Super. Ct. No. LA056105) (Los Angeles County)

Enrique Avila appeals from judgment after conviction by jury of voluntary manslaughter. (Pen. Code, § 192, subd. (a).)[1] The jury acquitted appellant of murder. (§ 187, subd. (a).) The trial court sentenced appellant to the upper term of 11 years in state prison.

Appellant contends that his conviction should be reversed because the trial court did not instruct on the law of mutual combat. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of June 22, 2007, appellant killed Owen Gin with a single stab wound to his heart. Appellant had been living with Gin's mother (his girlfriend) and Gin's sister. Gin was 26 years old and lived in another apartment in the same complex.

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[1] All statutory references are to the Penal code unless otherwise stated.

On the evening of June 22, they had all been drinking beer. Gin went out to a club with two friends. Appellant fought with Gin's mother.[2] He also fought with Gin's sister. Gin's sister called Gin on his cell phone and asked him to return to defend them from appellant.

Meanwhile, appellant packed a bag and went to the apartment of his cousin, Jorge Jaime, who lived upstairs in the same complex. Appellant and Jaime lay down to sleep in the living room with the blinds closed.

Sometime after midnight, Gin returned to the complex with his friends. His sister saw him looking for appellant and holding a bat. His mother refused to tell him where appellant was.

Gin knocked on the window of Jaime's apartment. Jaime parted the blinds enough to see that Gin was holding a bat. He told Gin that appellant had already left, although appellant was lying on the floor. Gin replied that Jaime should tell appellant that "whenever he found him, that he was going to beat the shit out of him." Gin left. He did not try to open the unlocked apartment door.

When appellant heard what Gin said to Jaime, he went immediately to Jaime's kitchen and grabbed a knife. Appellant left with the knife within one minute of Gin's departure. Jaime testified that appellant was angry when he left. Jaime tried to stop appellant but could not because of appellant's strength and temperament.[3]

Gin had gone downstairs and returned to his friends on the sidewalk just outside the complex gate. Gin's friend testified that he and Gin and their friend John were out on the sidewalk when they heard someone calling Gin's name in a calm and

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[2] Appellant testified that she said something that made him feel disrespected. He got angry so he grabbed her face and threw a cell phone at her. She testified that he hit her in the jaw.

[3] There was conflicting evidence whether, when appellant took the knife from Jaime's kitchen, he knew that Gin had a bat. Only Jaime looked out the window when Gin knocked. Jaime testified that he had not told appellant that Gin had a bat when he knocked on the window. Appellant testified that Jaime said, "That lady's son is looking for you, and he has a bat."

friendly voice. It was appellant, inside the complex at the top of the stairs. Gin walked toward appellant. Appellant said, "What's up?" and walked down the steps toward Gin. It looked liked appellant punched Gin in the chest. According to Gin's friend, Gin had not swung at appellant and did not have the bat. Gin's second friend had stayed behind them on the sidewalk with the bat.

After stabbing Gin, appellant went back to Jaime's apartment. One minute had elapsed since he left. According to Jaime, appellant said, "It was either him or me." Appellant washed the knife and asked Jaime to drive him to Tijuana. Jaime refused and called the police. Gin's sister found a bat near where her brother lay.

Appellant testified in his defense. He said he did not intend to kill Gin. He left Jaime's apartment because he was afraid that if he stayed in the apartment the other occupants would be in danger of Gin. He did not expect to use the knife when he confronted Gin. He only took it to defend himself. He imagined he could calm Gin down. As soon as he left Jaime's apartment he saw Gin with two friends down on the sidewalk. He said to Gin, "What's happening?" Then Gin walked up the stairs toward appellant. Gin said he was "going to fuck [appellant] up." Gin's friends stayed out on the sidewalk. Gin was holding a bat as he approached appellant.

Appellant did not want to run away from Gin or go back into the apartment. He told Gin "not to get closer to me because I had a knife." He was above Gin on the stairs. Gin "rushed" him, "lifted the bat" and "tried to hit" appellant. Appellant ducked to avoid the bat, and "lunged" at Gin with the knife. Appellant said he stabbed Gin because he was scared and he felt he had to use the knife to save his life.

Appellant's theory at trial was self-defense. His counsel argued that appellant did not want or expect to use the knife; he believed he was in danger when Gin swung the bat, and he had the right to stand his ground and use reasonable force to defend himself even if retreat was possible.

Before appellant testified, the trial court indicated that it would instruct on mutual combat pursuant to CALCRIM No. 3471 because there was evidence that

appellant rushed toward Gin with a knife and appellant was expected to testify that Gin rushed toward him with a baseball bat. Defense counsel objected on the grounds that there had not been evidence of mutual combat and that appellant would testify that he used the knife in self-defense. She said, "[b]ut if the court thinks it's relevant, I--" After appellant testified, defense counsel renewed her objection and the court decided not to give the instruction.

DISCUSSION

Appellant contends that the court should have instructed the jury on the law of mutual combat. (§ 197; CALCRIM 3471.) We consider the contention on the merits, but reject it because there was no substantial evidence to support the instruction.

Error in failing to instruct is invited when defense counsel expressly objects to the instruction and makes clear that he or she does so for tactical reasons. (*People v. Graham* (1969) 71 Cal.2d 303, 319, disapproved on other grounds in *People v. Ray* (1975) Cal.3d 20, 32.) "[I]f defense counsel suggests or accedes to [an] erroneous instruction because of neglect or mistake we do not find 'invited error'; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause." (*Graham,* at p. 319.) Here, defense counsel expressly objected to the mutual combat instruction twice. She did not express a deliberate tactical purpose, but her tactical reasons were evident from her argument to the jury that appellant, as a non-aggressor, had the right to stand his ground. As a mutual combatant he would have lost that right, even if he had attempted to withdraw.[4] All evidence pointed to a finding that appellant stood his ground. Nevertheless, because counsel did not express her tactical reasons on the record and because her remarks on the record do demonstrate

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[4] Any non-aggressor may stand his ground and defend himself from attack. He need not retreat even where retreat is possible. (*People v. Hughes* (1951) 107 Cal.App.2d 487, 493; CALCRIM 505.) An aggressor, on the other hand, loses his right to self-defense. He may restore it by trying, in good faith, to withdraw from the fight, but he may not stand his ground. He must retreat if circumstances permit. (§ 197; CALCRIM 3471.)

some confusion about the instruction's applicability, we consider appellant's contention on the merits.

A trial court has a sua sponte duty to instruct on a defense theory that is relied on by the defense and on any theory that is supported by substantial evidence that is not inconsistent with the defense theory. (*People v. Abilez* (2007) 41 Cal.4th 472, 517.)[5] For purposes of determining whether an instruction should have been given, we focus on the evidence that would justify the instruction (*People v. King* (1978) 22 Cal.3d 12, 15-16) "[*h*]*owever incredible*" it may seem. (*People v. Wilson* (1967) 66 Cal.2d 749, 762.) We resolve any doubts as to the sufficiency of the evidence in favor of appellant. (*Id.* at p. 763.)

Here, the instruction was inconsistent with appellant's trial theory that he was a non-aggressor and was therefore entitled to stand his ground when retreat was possible. Further, there was not substantial evidence to require the giving of the instruction.

Mutual combat requires a preexisting mutual intent to engage in a fight, before the claimed occasion for self-defense arose. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1050, 1052 [in which no reasonable jury could find pre-existing mutual intent when defendant punched a woman in response to her impulsive blow]. A good faith attempt to withdraw is also essential to restoration of the right to self-defense. (§ 197; *People v. Fowler* (1918) 178 Cal. 657, 671, disapproved on other grounds in *People v. Thomas* (1945) 25 Cal.2d 880, 901.) Mutual intent to engage in combat may arise suddenly between rivals and the combat need not be prolonged. (*People v. Quach* (2004) 116 Cal.App.4th 294, 300-301 [sudden shooting between rival gang members as they left a bar required instruction on the law of mutual combat].)

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[5] Where a defense is inconsistent with a theory relied on by the defense, but supported by substantial evidence, the court should inquire whether the defense requests the instruction on the alternative theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390.)

Appellant argues that he and Gin demonstrated preexisting intent to engage in a fight when they armed themselves and sought each other out for a confrontation. Appellant's testimony contradicts this claim because he testified that he did not intend to use the knife or fight and only hoped to calm Gin down. We recognize that a trial court may instruct on a defense that is supported by the evidence even where defendant's testimony is contradictory. (*People v. Barton* (1995) 12 Cal.4th 186, 201, 202-204.) But even if the jury found that appellant did have a preexisting intent to fight Gin, there is no evidence that appellant ever tried to withdraw from the fight.

Appellant contends that he attempted to withdraw when he told Gin not to come closer because he had a knife. A mutual combatant must actually and in good faith try to stop fighting, indicate by words or conduct that he wants to stop and has stopped fighting, and give his opponent a chance to stop fighting before his right to self-defense may be restored.**6** Viewed in the light most favorable to appellant, appellant's warning that he had a knife could be interpreted as a last minute attempt to prevent a fight, but it could not be interpreted as an attempt to withdraw from the

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6CALCRIM 3471 provides:

"A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if: [¶] 1. [He] actually and in good faith tries to stop fighting; [AND] [¶] 2. [He] indicates, by word or by conduct, to [his] opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that [he] has stopped fighting[;] [AND] [¶] 3. [He] gives [his] opponent a chance to stop fighting.

"If a person meets these requirements, [he] then has a right to self-defense if the opponent continues to fight.

"A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.

"If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend [himself] with deadly force and was not required to try to stop fighting."

combat which had not yet commenced. There was no evidence that he made any attempt to withdraw once the men engaged in a fight.

A mutual combatant is excused from attempting to withdraw if circumstances do not permit withdrawal, but only if his non-deadly attack is met with a sudden, deadly attack. Here, there is no evidence that appellant ever used non-deadly force against Gin. Moreover, circumstances permitted appellant to withdraw. He chose not to. If the jury believed appellant's testimony, he stood at the top of the stairs while Gin walked up toward him holding up a bat and threatening to "fuck [appellant] up." Appellant did not use the opportunity to retreat because he did not want to. Instead, he stood his ground and warned Gin not to come closer because he had a knife. The prosecutor asked, "[A]nd at that moment you just stood there, correct?" Appellant responded, "Yes." The prosecutor asked, "[K]nowing that he was coming at you with a bat and he was angry, that didn't cause you to want to maybe run back into the house or find safety?" Appellant responded, "No. The only thing that I told him was not to get close to me, that I had a knife." If the jury did not believe appellant, then there is no evidence that Gin attacked him at all. Thus, under any version of the facts, he was not excused from trying to withdraw.

In *People v. Quach, supra,* 116 Cal.App.4th 294, relied on by appellant, a mutual combat instruction was appropriate because a jury could have reasonably concluded that the defendant, a gang member, engaged in mutual combat and had no opportunity to withdraw. The defendant walked out of a bar in a group of people, some of whom were members of his own gang and some of whom were from a rival gang. One of the rival gang members "became agitated" and the defendant "tried to calm him down." (*Id.* at p. 297.) Based on one account, the rival gang member pulled a gun from his waist and fired toward the defendant before the defendant pulled out his own gun and fired it. No one was hurt and both men fled. (*Id.* at p. 298.) The trial court gave a mutual combat instruction (former CALJIC 5.56), but the Court of Appeal disapproved the wording of the instruction and reversed the attempted murder conviction. The instruction omitted the following rule: "'[W]here the counter assault is

so sudden and perilous that no opportunity be given to decline further to fight and he cannot retreat with safety he is justified in slaying in self-defense.'" (*Id.* at p. 303, quoting *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201.) Here, there was no evidence of "'an *attack . . . so sudden and perilous*'" that appellant could not withdraw. (*Quash,* at p. 302, quoting *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75, fn. 2.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Martin Herscovitz, Judge

Superior Court County of Los Angeles

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

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